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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of LISA and TOMISLAV
FISCHBACH.

C080007

LISA BARICEVIC,

(Super. Ct. No. 12FL01509)

Appellant,

v.

TOMISLAV FISCHBACH,

Respondent.

This is a judgment roll appeal in a marital dissolution proceeding. Because appellant Lisa Baricevic has failed to show any error on the face of the record, we affirm.

I. BACKGROUND

On November 4, 2014, the trial court issued a tentative decision on numerous issues raised by the parties at evidentiary hearings on June 13, 2014, July 1, 2014, and August 7, 2014. The court directed respondent Tomislav Fischbach to prepare a

statement of decision in conformity with those rulings. He apparently did so, and after considering Baricevic's objections, the court issued a ruling on February 3, 2015, rejecting Fischbach's proposed statement of decision in its entirety and stating the tentative decision would "become the court's statement of decision unless, within 10 days after service of this order (plus five days for mailing), a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision."

On February 18, 2015, Baricevic filed a request for statement of decision specifying 15 principal controverted issues.

The court then issued a statement of decision. As relevant here, the court set spousal support at \$1,200 per month and child support at \$948 per month to be paid by Fischbach effective November 1, 2014, both to decrease as the court imputed wages to Baricevic.¹ And as the court explained, a central issue with respect to the support awards was Baricevic's ability to work. After considering all the evidence, the court concluded she "is able to work, and can be gainfully employed."

Additionally, the court denied Baricevic's request for Fischbach to maintain life insurance for the benefit of herself and their child. The court ordered the parties to bear their own attorneys' fees and costs.

Baricevic timely appealed.

¹ The statement of decision also notes that on August 27, 2012, the court set spousal support at \$1,562 and child support at \$1,139. The court subsequently reduced spousal support to \$1,410 per month effective December 20, 2013, and child support to \$971 per month effective October 1, 2013.

II. DISCUSSION

A. *Principles of Appellate Review*

It is the appellant's burden "to provide an adequate record to assess error." (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.) Baricevic has elected to proceed with her appeal on only a partial clerk's transcript. (Cal. Rules of Court, rule 8.121.) Thus, the appellate record does not include a reporter's transcript of the hearings on these matters. This is referred to as a "judgment roll" appeal. (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082; *Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 207.)

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "This presumption has special significance when, as in the present case, the appeal is based upon the clerk's transcript." (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154.) We must conclusively presume evidence was presented that is sufficient to support the court's findings. (*Ibid.*) We do not presume the record contains all matters material to a determination of the points on appeal unless the asserted error "appears on the face of the record." (Cal. Rules of Court, rule 8.163; *Nat'l Secretarial Serv. v. Froehlich* (1989) 210 Cal.App.3d 510, 521.) "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented." (*Riley v. Dunbar* (1942) 55 Cal.App.2d 452, 455.)

Further, when the court issues a statement of decision, a party must timely bring any omissions or ambiguities in the court's decision to the trial court's attention; if the party does not do so, "that party waives the right to claim on appeal that the statement was deficient in these regards, and . . . the appellate court will imply findings to support the judgment." (*In re Marriage of Arceneaux, supra*, 51 Cal.3d at pp. 1133-1134.)

With these rules in mind, we turn to Baricevic's arguments on appeal.

B. Spousal and Child Support

The majority of Baricevic's arguments attack the trial court's spousal and child support awards. As a threshold matter, she raises various challenges to the trial court's decision to impute income to her. Relatedly, she contends the trial court erred in not considering the impact on the parties' minor child if she returned to work. Baricevic also argues the trial court erred in ordering automatic decreases in spousal support at specified intervals without adequate findings or evidence to support the decreases. We reject each of these claims.

1. Imputation of Income

"It has long been the rule in this state that a parent's earning capacity may be considered in determining spousal and child support." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 642.) " " " 'Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire. [Citation.]' " " [Citation.] Use of the earning capacity standard is inappropriate where a party lacks either the ability *or* the opportunity to work." (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 927-928.) Here, Baricevic contends the trial court erred in imputing income to her for purposes of setting child support without proper evidence. She also claims the trial court abused its discretion in imputing income to her based on testimony from Fischbach's employment and vocational assessment expert, and minimizing testimony from her doctor. We are foreclosed from addressing these claims by the state of the record on appeal.

Because this is a judgment roll appeal, we do not know what evidence was presented at the evidentiary hearings. In these circumstances, " "[the] question of the sufficiency of the evidence to support the findings is not open.' " (*Allen v. Toten, supra*,

172 Cal.App.3d at p. 1082.) To the extent Baricevic asserts no evidence was presented regarding her ability, willingness and opportunity to work, we must presume that such evidence was presented because we do not have a record before us to show otherwise. Moreover, Baricevic's arguments with respect to the weighing of the evidence rely on a declaration she submitted after the court issued its statement of decision in support of her motion for a new trial. "In reviewing the trial court's ruling, we must consider the facts before the court *at the time of its ruling*, and not by reference to evidence produced at a later date." (*Sacramento Area Flood Control Agency v. Dhaliwal* (2015) 236 Cal.App.4th 1315, 1328, fn. 5.) Regardless, we do not know what other evidence was presented to and considered by the court at the hearing. Only based on all of the evidence presented to the court could we consider Baricevic's claims.

Baricevic also contends the court erroneously concluded she received the expert's written analysis "7 months prior and placed significant emphasis on this erroneous fact." The statement of decision contains no such conclusion: "Patrick Sullivan's written analysis regarding wife's employability was done in or about August 2014. It has been no secret that husband and his expert Sullivan have taken the position for more than 7 months that wife has the ability to work." (Italics removed.) The trial court states wife was aware for more than seven months of Fischbach's argument that she had the ability to work. On the record before us, we must presume this finding was supported by the evidence.

2. *Interests of the Child*

Family Code section 4320 identifies various factors a court must consider in ordering spousal support.² (See *In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93 ["In awarding spousal support, the court must consider the mandatory guidelines of

² Undesignated statutory references are to the Family Code.

section 4320. Once the court does so, the ultimate decision as to amount and duration of spousal support rests within its broad discretion and will not be reversed on appeal absent an abuse of that discretion” (fn. omitted)].) Among these factors is: “The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.” (§ 4320, subd. (g).)

Baricevic’s assertion that the trial court ignored this factor in setting spousal support is contradicted by the statement of decision. In it, the trial court went through the various factors described in subdivisions (a) through (n) of section 4320 under a separate heading and set forth its assessment of how each factor applied. Specifically, under the heading for section 4320, subdivision (g), the court referenced its earlier related ruling on imputation of income and added: “The court has found that wife can be gainfully employed. The parties’ minor child will not be unduly interfered with by such employment.” Thus, we reject the assertion that the court did not conduct an analysis under section 4320, subdivision (g).

Baricevic also complains the trial court “did not take into consideration the child’s best interest when it imputed income” to her for purposes of setting child support. “ ‘In California there is a “statewide uniform guideline for determining child support orders.” ’ ” (*In re Marriage of Katzberg* (2001) 88 Cal.App.4th 974, 979.) In computing child support obligations under these guidelines, the trial court has discretion to “consider the earning capacity of a parent in lieu of the parent’s income, consistent with the best interests of the children.” (§ 4058, subd. (b).) As discussed above, the court noted this specific finding in its spousal support ruling. Moreover, we must assume, under the authorities cited above, that the trial court at least implicitly found that imputation of income was consistent with the best interests of the children for purposes of setting child support.

To the extent Baricevic complains that no evidence was presented that imputation of income would be in the child's best interest, we must presume the evidence supported the trial court's finding because we do not have a record before us to show otherwise.

3. *Spousal Support Reductions*

Baricevic asserts the trial court erred in ordering automatic reductions in spousal support at specified intervals without evidence to support the reductions or making a finding as to what evidence would support the reductions. Baricevic also contends the trial court did not consider the statutory factors in section 4320 in setting the step-down amounts.

After the trial court reviewed each factor described in subdivisions (a) through (n) of section 4320 as described above, it concluded: "Taking all of the evidence and arguments into account, the court awards spousal support as follows:

"From 11-1-14 to 5-30-15, \$1,200 per month;

"From 6-1-15 to 12-31-15, \$1,000 per month;

"From 1-1-16 to 12-31-16, [\$]900 per month;

"Beginning 1-1-17, \$800 per month until further court order."

It appears from the statement of decision that the findings that supported the reductions were imputation of minimum wage to Baricevic effective June 1, 2015, and the subsequent increases of those imputed wages effective January 1, 2016, and January 1, 2017. It also appears the trial court considered the statutory factors in setting the step-down amounts. Regardless, Baricevic cannot complain about ambiguous or missing findings in the statement of decision because she did not file any objections to it. "If the party challenging the statement of decision fails to bring omissions or ambiguities in it to the trial court's attention, then, under Code of Civil Procedure section 634, the appellate court will infer the trial court made implied factual findings favorable to the prevailing party on all issues necessary to support the judgment, including the omitted or ambiguously resolved issues." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150

Cal.App.4th 42, 59-60.) Thus, on the record before us, we must presume both that the court made all findings necessary to support its decision and that all of those findings were supported by the evidence presented to the court.

C. March 18, 2014, Hearing

Baricevic argues she was unrepresented by counsel at a March 18, 2014, hearing, and the trial court abused its discretion in denying her request for a continuance on this basis. However, on appeal she has supplied no record of such a request or the trial court's ruling. "As such, no error has been affirmatively shown and the trial court's ruling must be presumed to be correct." (*Nat'l Secretarial Serv. v. Froehlich, supra*, 210 Cal.App.3d at p. 522.)

D. Life Insurance

Baricevic asserts the trial court abused its discretion in denying her request for Fischbach to maintain life insurance for the benefit of herself and their child because she was reliant on him for support. Section 4360, subdivision (a) provides in relevant part: "For the purpose of Section 4320, where it is just and reasonable in view of the circumstances of the parties, the court, in determining the needs of a supported spouse, may include an amount sufficient to . . . maintain insurance for the benefit of the supported spouse on the life of the spouse required to make the payment of support . . . so that the supported spouse will not be left without means of support in the event that the spousal support is terminated by the death of the party required to make the payment of support." The statement of decision simply notes, "No relief is granted on this issue." Again, we are foreclosed from considering Baricevic's argument because this is a judgment roll appeal and the evidence on which the trial court acted is not before us.

E. Attorneys' Fees

Baricevic contends the trial court failed to consider the statutory factors for awarding attorneys' fees under section 2030. Section 2030, subdivision (a)(2) states: "When a request for attorney's fees and costs is made, the court shall make findings on

whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties." The court did consider the statutory factors. It ruled as follows: "Each side is to bear his/her own attorney's fees. While husband's ability to pay attorney's fees (for himself and wife) is greater than wife's, and he has been ordered to pay some of her fees in the past, the court finds that: (1) with the support ordered to date and herein, husband cannot afford to pay both his own attorney's fees and wife's; and (2) this litigation was unduly complex, confused and protracted in large part because of wife's behavior in raising issues late in the proceedings, in making lengthy and confusing presentations, in making claims based upon unreliable evidence, and at times in disputing matters without reasonable basis for doing so; therefore any award of attorney's fees under [section 2030] would be offset by an award against her under [section 271]." (Italics removed.) Baricevic simply reargues the trial court's findings largely based on the briefing she submitted in support of her motion for new trial. The obvious problem with Baricevic's argument is that, as we have noted already, we are limited to the evidence that was before the trial court and that is not before us. Given the incomplete record, under the authorities we have set forth already, we must assume there was evidence to support the court's findings.

Baricevic also argues the trial court improperly denied attorneys' fees by imposing a section 271 sanction. It is not obvious, however, that the trial court imposed such a sanction. The trial court declined to award attorneys' fees because Fischbach could not afford to pay Baricevic's attorneys' fees, adding that "any" award of attorney's fees under section 2030 "would be" offset by an award against her under section 271. But even if the trial court imposed such a sanction, it would be warranted under section 271 for conduct that "furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." (§ 271, subd. (a).) These sanctions can "be imposed

only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.” (§ 271, subd. (b).) Baricevic asserts such notice must be by formal motion. Even assuming this was true, because of the lack of a complete record in this case, we must presume such notice was provided or that Baricevic waived the lack of written notice either expressly or by failing to object to the lack thereof at the hearing. Finally, Baricevic argues the trial court failed to consider required statutory factors under section 271. Again, on the record before us, we must presume the court made all findings necessary to support its decision. Accordingly, Baricevic has shown no error on the face of the record with respect to the court’s ruling on attorneys’ fees.

III. DISPOSITION

The judgment is affirmed. Respondent Tomislav Fischbach shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/S/

RENNER, J.

We concur:

/S/

MAURO, Acting P. J.

/S/

MURRAY, J.